Supreme Court, U. S.
FILED
FEB 16 1973
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1142

BRYAN MELTON and WIFE, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

Petitioners,

—v.—

CORLEY R. YOUNG, MRS. C. M. HOOPER, REV. H. H. BATTLE, JAMES L. JENKINS, G. PAUL SAMS and WILLIAM D. LEBER, The Board of Education of Chattanooga, Tennessee, S. DEAN PETERSEN, Commissioner of the Board; DR. B. L. VON SCHAAF, Principal of Brainerd High School, Chattanooga, Tennessee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union Foundation
22 East 40th Street
New York, N. Y. 10016

JACK KERSHAW
B-3 Stahlman Building
Nashville, Tennessee 37201

Attorneys for Petitioners

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No. .....

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—v.—

CORLEY R. YOUNG, MRS. C. M. HOOPER, REV. H. H. BATTLE, JAMES L. JENKINS, G. PAUL SAMS and WILLIAM D. LEBER, The Board of Education of Chattanooga, Tennessee, S. DEAN PETERSEN, Commissioner of the Board; DR. B. L. VON SCHAAF, Principal of Brainerd High School, Chattanooga, Tennessee,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals, entered in the above entitled case on August 30, 1972, petition for rehearing denied November 21, 1972.

Opinions Below

The opinion of the United States Court of Appeals for the Sixth Circuit is reported at 465 F.2d 1332 and is set forth in the Appendix, *infra,* at pp. 1a-13a. The decision of the United States District Court for the Eastern District of Tennessee is reported at 328 F. Supp. 99 and is set forth in the Appendix, *infra,* at pp. 16a-36a.

Jurisdiction

The opinion and judgment of the Court of Appeals were entered on August 30, 1972. A timely-filed petition for rehearing was denied on November 21, 1972 (App., *infra,* pp. 14a-15a). The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether the First and Fourteenth Amendments permit school officials to punish a high school student for engaging in expressive activity, consisting solely of wearing in school a small patch replica of a Confederate flag on the sleeve of his jacket, because reaction to the use of that emblem as an official school symbol had been one cause of serious racial tensions and substantial disorders at the school during the previous academic year?

Statement of the Case

On September 8, 1970 the petitioner, Rod Melton, a white student at Brainerd High School, Chattanooga, Tennessee, came to school wearing a nylon jacket with a small emblem

depicting a Confederate flag (App., *infra,* p. 4a). His avowed purpose in wearing the symbol was to express pride in his Confederate heritage (App., *infra,* p. 4a). He said nothing to anybody, urged no one to wear the insignia, made no speeches, handed out no emblems (TT. 530-37).*

During the morning, a faculty member informed Dr. Von Schaaf, the principal, that the petitioner was wearing the emblem, and he was summoned to the principal's office (App., *infra,* p. 24a). He was asked to remove the jacket, was threatened with prosecution if he incited a riot, but allowed to return to the class with the jacket on (App., *infra,* p. 24a, PI 29-30). By noon, two assistant principals had told Dr. Von Schaaf that several students had complained about the patch and that it was "causing tension to arise among the student body" (PI 30).[1] The petitioner was called back to the principal's office and told that the emblem was provocative and thereby in violation of the principal's recently promulgated rule prohibiting "provocative symbols on clothes" (App., *infra,* p. 24a). Being told either to remove his jacket or leave the campus, the petitioner went home.

He returned to school the next day, again wearing the jacket with the emblem. Once again he was called to the

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* "PI—" refers to the preliminary injunction hearing. "TT—" refers to the transcript of trial.

[1] At the trial Dr. Von Schaaf described the reports he received as follows:

> Q. Did the teacher or your assistant tell you that the learning process was being disturbed? A. The report was that it was causing disruptions and comments among students and that it was causing a problem in the classrooms.
>
> Q. How was this manifested? A. By the seemingly increase of active conversions, et cetera.
>
> Q. By talk, in other words? A. Yes (TT. 451).

principal's office and instructed to leave school and not return unless he removed the patch. When he refused to do so, he was suspended indefinitely, with a letter to his parents stating that the emblem had caused "some consternation among the students and faculty."

The justification subsequently offered for the principal's forecast that the petitioner's emblem would be provocative and could cause disruption was based upon the disturbances experienced at the school during the 1969-70 academic year (App., *infra,* pp. 5a-6a, 34a-35a). Brainerd High School was integrated in 1966, by federal court order. Integration seemed to proceed smoothly until the fall of 1969. At that point the use of the Confederate flag as the school symbol and the song "Dixie" as the school pep song became an issue with a number of the black students, who comprised approximately 15 percent of the student body (App., *infra,* pp. 2a-3a, 18a-19a). On three occasions in September and October 1969, black students protested the use of these official symbols by walking out of pep rallies. During the halftime at a football game, some black students went out on to the field and attempted to burn a Confederate flag. In turn, the following week, several hundred white students staged a walkout in response to rumors that the Confederate flag and "Dixie" were going to be eliminated as school symbols.[2]

Though the racial situation at the school remained tense, there were no further, major disruptions until April 1970, when confrontations between black and white students led to the closing of school for several days. One of the grievances of the black students was the continued use of the

[2] The dispute subsequently involved members of the community and caused the imposition of a curfew for four nights.

Confederate flag and "Dixie" as official school symbols. Order was restored and the academic year concluded.

There was absolutely no evidence that the wearing of the Confederate emblem as a *personal* expression of views was offensive to the black students or played any role in the disturbances (TT. 412, 437). Indeed, the petitioner wore the same patch almost daily throughout the 1969-70 academic year without incident. The objection was always to the official use of Confederate symbolism (TT. 80).

During the summer of 1970 a biracial Advisory Committee met to review the difficulties which had faced Brainerd High the previous year. The Committee identified, as one of the seven factors contributing to tensions, the Confederate symbolism used by the school, particularly the nickname "Rebel", the song "Dixie" and the Confederate flag. In July, the school board adopted the Committee's recommendations that the "Rebel" nickname be retained, but the flag and song be discontinued as official school symbols.[3]

Against this background, the principal determined that the petitioner's wearing a replica of a Confederate flag as a personal symbol would be provocative and disruptive. In the District Court's view, the Confederate symbol had been one cause of the previous year's disruption, the principal anticipated a tense situation at the start of the 1970-71 year, and he feared repetition of the difficulties if student use of the Confederate symbol were permitted (App., *infra,* pp. 34a-35a).

Overlooked were the following significant factors, noted by the dissenting opinion below:

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[3] The principal testified that the black students did not object to the nickname "Rebels" because they too could identify with it (TT. 371-72).

—The previous year's protests were directed at the use of the Confederate flag as an official symbol not a personal emblem; elimination of official sanction presumably ameliorated the black students' grievances and alleviated the situation;

—At a football game held the week before school started and played against an all black high school, spectators waived Confederate flags without incident;

—The petitioner's small, personal symbol, worn as part of an article of clothing and in a quiet peaceful manner had no inherent potential for causing disruption;

—The complaints received by the principal were minimal if not trivial, and the principal made no inquiry as to whether the use of the personal symbol would cause any substantial difficulty (App., *infra,* pp. 10a-12a).

In addition the principal testified that, following the petitioner's suspension, he allowed other symbols to be displayed at the school, including peace and ecology symbols (TT. 392, 410), because he did not find them provocative or disruptive.

This was the factual setting in which the United States District Court for the Eastern District of Tennessee (Wilson, C.J.) considered the petitioner's civil rights act complaint for declaratory and injunctive relief, brought pursuant to 42 U.S.C. Section 1983. Following a hearing in October 1970, it was stipulated that the petitioner would return to school, without wearing his patch, pending the final resolution of the issues. After a three day hearing in the spring of 1971, the District Court entered its opinion. First, the Court held that the principal's regulation, prohibiting

the wearing of "provocative" symbols, was unconstitutionally vague and lacked the precision and specificity required in the First Amendment area (App., *infra,* pp. 28a-30a). However, the Court further ruled that the principal had authority, independent of the particular regulation, to maintain school discipline. Accordingly the Court went on to consider whether the petitioner's suspension violated the First Amendment. Finding this Court's decision in *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969) to be distinguishable, the District Court concluded that the suspension was justified.

On appeal, the Sixth Circuit, in a 2 to 1 decision, affirmed the District Court. Writing for the majority, District Judge Keith (sitting by designation) held that the prior difficulties involving the Confederate flag justified the principal's prediction that disruption would occur if the petitioner were permitted to wear his insignia, and therefore, validated the suspension of the petitioner for his refusal to cease wearing it.

Circuit Judge Miller dissented. In his view, once the District Court found the "provocative symbol" rule void, it could not be applied to justify the suspension. Assuming that it could, Judge Miller found that the difficulty experienced in the previous academic year, which was focused on the use of official symbols, provided no justification for punishing the wearing of a personal symbol the following year. In Judge Miller's view, the evidence in this case "clearly brings it within the ambit of *Tinker,*" (App., *infra,* p. 10a).

REASONS FOR GRANTING THE WRIT

Certiorari should be granted because the decision of the Court of Appeals conflicts with applicable decisions of this court, particularly *Tinker* v. *Des Moines Independent Community School District, supra,* which establishes the right of freedom of expression by public school students, and *Cohen* v. *California,* 403 U.S. 15 (1971) limiting the extent to which speech can be abridged because of the potential audience reaction to it. Further, the decision below reflects the need for this Court again to consider the parameters of freedom of expression in our high schools and to define the conditions, if any, which justify its abridgment. In particular, two issues, apparently unresolved by *Tinker,* require resolution: (1) what conditions justify the prediction by school officials that disruption will result from expressive activity, and (2) can the hostile reaction of other students, actual or threatened, provide the basis for suppressing speech?

1. This Court's decision in *Tinker,* properly applied, should have easily disposed of this case in a manner favorable to the petitioner. For presumably *Tinker* afforded complete First Amendment protection to the petitioner's "silent, passive expression of opinion, unaccompanied by any disorder or disturbance *on the part of petitioner.*" 393 U.S. at 508 (emphasis added). On the campus, as in the community at large, mere advocacy of ideas, particularly in such a passive medium and no matter how controversial, "is entitled to full protection." *Healy* v. *James,* 408 U.S. 169, 33 L. Ed.2d 226, 286 (1972). Only when that expression merges with *conduct* by the speaker which materially disrupts classwork or involves substantial disorder or in-

vades the rights of others may school officials intervene. *Grayned* v. *City of Rockford,* 408 U.S. 104, 33 L. Ed.2d 222, 233 (1972).[4]

Nevertheless, the proper interpretation of *Tinker* divided the court below, with the majority believing that previous disturbances justified the principal's fears that the petitioner's symbol would be disruptive, and the dissent thinking otherwise. Such disagreement is not unusual, for in many cases both students and school officials equally rely on *Tinker* to support their contrary contentions. See, *e.g., Williams* v. *Eaton,* 468 F.2d 1079, 1083 (10th Cir. 1972). Similarly, on virtually identical facts, courts have both allowed and disallowed the wearing of armbands as a symbol of protest. Compare, *Butts* v. *Dallas Independent*

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[4] In *Grayned,* this Court upheld an anti-noise ordinance which prohibited disturbing classes. The Court's discussion of *Tinker* is illuminating because it makes clear that the focus of the inquiry must be on the actions of the speaker:

> The wearing of armbands was protected in Tinker because the students "neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder." Id. at 514. Compare Burnside v. Byers, 363 F.2d 744 (CA 5, 1966), and Butts v. Dallas Independent School District, 436 F.2d 728 (CA 5, 1971), with Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (CA 5, 1966). 33 L. Ed.2d at 233.

The contrast between *Burnside* and *Blackwell,* relied on in *Tinker,* is significant. In *Burnside,* the court held that the mere wearing of freedom buttons by black students, unaccompanied by improper conduct by those students, was not inherently disruptive. On the other hand, in *Blackwell* the students accosted others, forced the buttons on them, and threw the buttons through windows, causing the court to conclude that "the reprehensible conduct described above was so inexorably tied to the wearing of the buttons that the two were not separable." 363 F.2d at 754.

Here, of course, the petitioner's activity parallels *Burnside.* He simply wore his Confederate patch, nothing more. The insignia generated some discussion and a few complaints.

School District, 436 F.2d 728 (5th Cir. 1971) (allowing anti-war armbands even though the issue provoked threatened boycotts, sit-ins, mass rallies and counter-demonstrations) with, *Hill* v. *Lewis,* 323 F. Supp. 55 (E.D. N.C. 1971) (prohibiting anti-war armbands in a similar factual setting).

Such divergent results are likely to continue unless this Court further elaborates those criteria and conditions which allow school officials to prohibit or punish expressive activity. The Fifth Circuit recently noted that the *Tinker* standard, which has been interpreted as allowing officials to intervene when they reasonably forecast substantial disruption of or material interference with school activities, is not an easy one to apply. *Shanley* v. *Northeast Independent School District,* 462 F.2d 960, 970-71 (5th Cir. 1972); see also, *James* v. *Board of Education,* 461 F.2d 566 (2d Cir. 1972) (upholding the right of a high school teacher to wear an anti-war armband in school); *Russo* v. *Central School District,* —— F.2d ——, 41 Law Week 2291 (2d Cir. 1972) (allowing a teacher to refuse to participate in the pledge of allegiance). Consequently, uncertainties in the *Tinker* rule have been utilized by school officials to prohibit protected expression. However, as the Fifth Circuit has held:

> . . . The precedential value of the Tinker decision is [not to be] nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative. *Butts* v. *Dallas Independent School District, supra,* 436 F.2d at 732.

This Court should grant review to clarify these issues.

2. Just as the majority below allowed the petitioner to be punished solely for a silent, passive expression of opinion, it also allowed suppression of his particular message because of the anticipated reaction of other students to that message. The petitioner argued, and the dissent agreed, that his wearing a Confederate emblem as a *personal* symbol would not and should not prompt a hostile, disruptive response by black students—who had succeeded in eliminating the flag as an official school symbol—any more than should the wearing of a Cross or Star of David as a personal symbol. The majority opinion thought otherwise and held that the possibility of such a response justified the prohibition of such Confederate symbols. The case thus squarely raises the issue of whether the "special characteristics of the school environment" afford to students of one persuasion a veto power over the First Amendment rights of students who hold contrary views.

In *Healy* v. *James, supra,* this Court held that its precedents "leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large." 33 L. Ed.2d at 279. The question here is whether the First Amendment prohibition on a heckler's veto applies with "less force" on high school campuses.

It is now well settled that the possible reactions of a hostile audience cannot justify the suppression of speech, see *Terminiello* v. *Chicago,* 337 U.S. 1 (1949), *Cohen* v. *California,* 403 U.S. 15 (1971), particularly when racial issues are involved, see, *e.g., Edwards* v. *South Carolina,* 372 U.S. 229 (1963); *Gregory* v. *Chicago,* 394 U.S. 111

(1969).[5] A municipality could no more prohibit the wearing of the Confederate insignia on its streets than it could prevent the wearing of the black liberation emblem.[6] This Court made it clear in *Cohen* that there can be only one constitutional response to the argument that a hostile audience can veto speech:

> There may be some persons about with such lawless and violent proclivities, but that is an insufficient base upon which to erect, consistently with constitutional values, a government power to force persons who wish to ventilate their dissident views into avoiding particular forms of expression. 403 U.S. at 23.

Petitioner submits that the "special characteristics of the school environment" cannot constitutionally justify a different rule, one which allows speech to be prohibited because those hostile to it may provoke disruption.[7] The Fifth Circuit has suggested the proper First Amendment rule:

> . . . those students who would reasonably exercise their freedom of expression should not be restrained or punishable at the threshold of their attempts at ex-

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[5] *Edwards* and *Gregory*, among other cases, hold that the possibility of hostility by whites cannot justify preventing the exercise of First Amendment rights by blacks. This case presents exactly the opposite side of the constitutional coin.

[6] We assume that the ideas conveyed by either symbol could not be characterized as "fighting words" and proscribed for that reason. See *Tate* v. *Board of Education of Jonesboro, Arkansas*, 453 F.2d 975 (8th Cir. 1972) (holding the playing of "Dixie" was not the equivalent of "fighting words").

[7] In hair length cases, at least two Circuits have squarely held that the right of high school students to wear long hair may not be infringed because of the harassment and disturbance caused by other students. *Massie* v. *Henry*, 455 F.2d 779, 783 (4th Cir. 1972); *Crews* v. *Cloncs*, 432 F.2d 1259, 1265-66 (7th Cir. 1970).

> pression merely because a small, perhaps vocal or violent, group of students with differing views might or does create a disturbance. *Shanley* v. *Northeast Independent School District, supra,* 462 F.2d at 974.

Rather than allowing one group of students to veto the views of another, schools must teach students "mutual respect for each other's constitutional rights." *Butts* v. *Dallas Independent School District, supra,* 436 F.2d at 732. Only through vigorous debate can schools fulfill their "central role in preparing their students to think and to analyze and to recognize the demagogue." *James* v. *Board of Education, supra,* 461 F.2d at 574.

For almost two decades the federal courts have been involved in the enterprise of fulfilling the mandate of *Brown* v. *Board of Education,* 347 U.S. 483 (1954). The problems posed by the use and retention, as official school symbols, of the emblems of the Confederacy have been substantial. See, *e.g., Banks* v. *Muncie Community Schools,* 433 F.2d 292 (7th Cir. 1970) (holding that students had a First Amendment right to adopt Confederate symbols as official school symbols); *Tate* v. *Board of Education of Jonesboro, Arkansas, supra* (holding that black students could be disciplined for walking out of a pep rally when "Dixie" was played); *Caldwell* v. *Craighead,* 432 F.2d 213 (6th Cir. 1970), *cert. denied* (allowing the discipline of a black band member who refused to play "Dixie"); *Smith* v. *St. Tamany Parish School Board,* 316 F. Supp. 1174 (E.D. La. 1970), *aff'd,* 448 F.2d 414 (5th Cir. 1971) (directing the removal of all Confederate flags from the school, but allowing students to wear their own personal Confederate insignia

and buttons). Eliminating the officially sanctioned use of symbols offensive to black students is one thing, prohibiting students from wearing personal symbols expressive of their personal views is quite another. The national imperative of providing racial equality in education should not be sought at the expense of the First Amendment.

CONCLUSION

For the reasons set forth above, certiorari should be granted.

Respectfully submitted,

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, N. Y. 10016

JACK KERSHAW
B-3 Stahlman Building
Nashville, Tennessee 37201

Attorneys for Petitioners

February 19, 1973

APPENDIX

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1704

BRYAN MELTON AND WIFE, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

Plaintiffs-Appellants,

v.

CORLEY R. YOUNG, *et al.* (Chattanooga, Tenn. Board of Education, Commissioner and Principal),

Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TENNESSEE

Decided and Filed August 30, 1972

Before: MILLER, *Circuit Judge,* KENT, *Circuit Judge* and KEITH,* *District Judge.*

KEITH, *District Judge.* This is an appeal from a judgment of the District Court for the Eastern District of Tennessee determining that the suspension of appellant Rod Melton from Brainerd High School at Chattanooga, Tennessee was not violative of his constitutional rights.

Appellant[1] instituted this action in the District Court under 42 U.S.C. § 1983 for declaratory and injunctive relief

* Honorable Damon J. Keith, United States District Judge for the Eastern District of Michigan, sitting by designation.

[1] When used through this opinion "appellant" refers to the minor, Rod Melton.

alleging appellant's various constitutional rights were violated because the principal of his high school suspended him for wearing an emblem depicting a Confederate flag on the sleeve of his jacket.

The background of this case is recited in the extensive opinion entered by the District Judge and we will merely capsulize the factual circumstances leading to appellant's suspension.

Brainerd is a public high school in the city of Chattanooga, Tennessee. Until 1966 Brainerd was operated as an all white school which had adopted as its nickname the word "Rebel" and used the Confederate flag as the school flag along with the song Dixie as its pep song. The school has been attended by both white and black students since 1966; by 1969 the student body consisted of 170 black and 1224 white students.

The record indicates that with the advent of the 1969 school year the student body became racially polarized as a result of continuing controversy over the use of the Confederate flag and the song Dixie at various school functions. It also appears that on October 8, 1969 demonstrations took place at the school which disrupted classes and that on the evening of the same day a motorcade drove through various parts of the city waving Confederate flags. Thereafter various disturbances took place in the city finally culminating in the imposition of a city-wide curfew for four nights from October 13 through October 17, 1969. The District Court also found that throughout the remainder of the fall semester considerable racial tension existed within the student body which continued on into the following spring. During this period it was necessary to call for police assistance amid several confrontations and also to

close the school for the purpose of restoring order and calming tensions.

In May, 1970, the Brainerd school administration and P.T.A. appointed a committee of citizens to study the difficulties of the past year and recommend remedial action for the ensuing year. Among the conclusions of the committee were the nickname "Rebel," the song Dixie, and the Confederate flag were precipitating causes of tension and disorder within the school. As a corrective measure the committee recommended that the use of the Confederate flag as a school symbol and the use of the song Dixie as the school pep song be discontinued but that the nickname "Rebel" be retained. These recommendations were adopted as official policy by the School Board at its meeting on July 8, 1970 along with the directive to school administrators that each principal develop and disseminate within the student body a "code of conduct"[2] consistent with the recommendations by the opening of the school in September, 1970. It is this code and the consequences of its enforcement that gave rise to this lawsuit.

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[2] Relevant portions of the code provided as follows:

a) "Also, provocative symbols on clothing will not be allowed."

b) Re: Brainerd High School ..... year 1970-71

SYMBOLS:

According to the Board of Education, July 8th, 1970, meeting the status of symbols for Brainerd High School is as follows:

The Confederate Flag and Confederate Soldier cannot be used as symbols for any public school in Chattanooga, therefore, all displays of the Flag and Soldier are removed from the school premises and cannot be used in any display where Brainerd is involved.

SONG DIXIE:

The song "Dixie" can no longer be used as a fight or pep song at Pep Meetings, Athletic contests or other school functions. It may be played in concert when other music of similar kind composes the program.

Appellant, after both he and his parents were informed of the new rules, wore a jacket to school with an emblem depicting a Confederate flag on one sleeve. He was asked to remove the emblem or cease wearing the jacket while in school by the principal but declined to do so. After he was allowed to return to class several complaints from both faculty and students caused the principal to call appellant to his office and request him to remove the jacket, which request was again refused. The principal then indicated that it was his judgment that the emblem was "provocative" and in violation of the school code and thereupon he directed that appellant either remove the jacket or leave the school. Appellant chose to absent himself from the campus.

The following day appellant presented himself at the school with the same jacket and emblem and upon being sent to the principal's office and being requested to remove the jacket stated that he was merely demonstrating pride in his Confederate heritage by the wearing of the flag and that he had no other motive. Appellant was then told to leave school and not return until he was willing to stop displaying the Confederate emblem while in school. The above two suspensions occurred on September 8 and September 9, 1970 respectively and letters were sent to appellant's parents on both occasions stating the reasons for the suspension.

The District Court issued an opinion finding, inter alia, that the portion of the school regulation forbidding students from wearing "provocative symbols" upon their clothing was unconstitutionally "vague, broad, and imprecise" in derogation of the precepts of both the First and Fourteenth Amendments to the United States Constitution. Appellee does not argue this determination on appeal hence we will not discuss it.

Although the plaintiff-appellant was suspended pursuant to a regulation that was subsequently determined to be unconstitutional, the District Court apparently felt that the suspension was nevertheless valid for the reason that the suspension would have been a legitimate exercise of the school officials' inherent authority to curtail disruption of the educational process even in the absence of a regulation. This Court agrees with the District Court's finding.

Turning now to the substance of this appeal we note that counsel for appellant has engaged in a proselytizing diatribe bordering on the edge of uncivility at the most, and poor professional taste at the least, in an effort to expand the issues facing this Court. In our view the only question for determination is whether a public high school student's suspension for his unwillingness to stop wearing a Confederate flag patch was violative of the First and Fourteenth Amendments under the circumstances in existence at the time of the suspension?

This is a troubling case; on the one hand we are faced with the exercise of the fundamental constitutional right to freedom of speech, and on the other with the oft conflicting, but equally important, need to maintain decorum in our public schools so that the learning process may be carried out in an orderly manner. It is abundantly clear that this Court will not uphold arbitrary or capricious restrictions on the exercise of such jealously guarded and vitally important constitutional tenets. However, it is contended here that the circumstances at the time of appellant's suspension were such that the District Court could properly find that

> "[t]he Principal had every right to anticipate that a tense, racial situation continued to exist at Brainerd

> High School as of the school [sic] in September of 1970 and that repetition of the previous year's disorders might reoccur if student use of the Confederate symbol was permitted to resume."

It is our view after an independent examination[3] of the record that the conclusions of the District Court are fully supported by the evidence.

In the leading case of *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503, the Supreme Court stated, inter alia, that student conduct which "materially disrupts class work or involves substantial disorder or invasion of the rights of others" is not afforded the cloak of protection provided by the First Amendment. Recognizing the problems discussed in *Tinker,* this Court, in the case of *Guzick* v. *Debrus,* 431 F. 2d 594 (1970) indicated its belief that

> " . . . the potentiality and imminence of the admitted rebelliousness in the Shaw students support the wisdom of the no-symbol rule. Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished."

In this regard it should be noted that District Judge Frank Wilson's opinion reflects a careful and studied consideration of the precepts of *Tinker* and its application to the case before the Court. In the language of the trial court

> "Unlike the *Tinker* case, where the Court found no evidence of either actual or potential disruptive conduct,

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[3] *Edwards* v. *South Carolina,* 372 U.S. 229, 235 (1963); *Jacobellis* v. *Ohio,* 378 U.S. 184, 189 (1964).

but only an 'undifferentiated fear or apprehension of disturbance,' the record in the present case reflects quite clearly that there was substantial disorder at Brainerd High School throughout the 1969-70 school year, that this disorder most materially disrupted the functioning of the school, so much so that the school was in fact closed upon two occasions, that much of the controversy the previous year had centered around the use of the Confederate flag as a school symbol and that the school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970."

We conclude that this determination is fully supported by the evidence presented to the Court. We also think that Judge Wilson was correct in his determination that *Guzick, supra,* permitted the school authorities to stave off any potential danger resulting from appellant's conduct.[4]

It is therefore our conclusion that under all of the circumstances herein presented that appellant's suspension was not violative of his First and Fourteenth Amendment rights and that the judgment below was proper.

Affirmed.

MILLER, *Circuit Judge,* dissenting. The plaintiff in this case, Rod Melton, a student at Brainerd High School in Chattanooga, was suspended from school by the Principal because of his refusal to cease wearing a small shoulder patch sewn on one sleeve of his jacket and depicting the Confederate Flag. The sole reason for such suspension, as found by the district court and established by the evi-

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[4] See also *Norton* v. *Discipline Committee of East Tennessee State University,* 419 F.2d —— (6th Cir. 1969).

dence, was that the student, in the judgment of the Principal, had violated that portion of a school code of conduct which provided as follows: *"Also, provocative symbols on clothing will not be allowed."* The district court held, and I think correctly so, that this regulation was invalid and unenforceable because of its vagueness and lack of specificity. If the rule under the sole authority of which the student was suspended is invalid because it infringed upon the rights of the student to freedom of speech and expression, as the district court clearly held, it follows, in my opinion, that the student was entitled to have the suspension itself declared illegal and to have the benefit of the injunctive relief which he sought by his complaint.

It is interesting to note that the district court, in invalidating this provision of the code, stated:

> "Although elsewhere in the regulations Confederate symbols were barred from use as school symbols and although there is evidence that the words 'provocative symbols' were construed by the school principal to mean 'that which would cause a substantial disruption of the student body,' such an interpretation is subjective to the principal, for nowhere in the regulatory scheme are the words 'provocative symbols' defined."

Yet the district court proceeded in its opinion to find that the Principal had every reason to believe, because of the disturbances which occurred in the prior school year, the wearing of the shoulder patch was provocative and might lead to a disruption of the proper functions of the school. If his judgment in construing the regulation was subjective to him when he undertook to apply the code of conduct and assigned such code as the sole reason for

suspension, it is difficult for me to fathom why his judgment should not be regarded equally as subjective in attempting to assess the validity of the suspension upon the hypothetical assumption of the district court that the Principal could have acted, although he did not, on the basis of his inherent authority over the operation of the school.

Since the Principal acted pursuant to the regulation alone and that regulation is void, it necessarily follows that the student's constitutional rights were infringed and that he is entitled to appropriate relief. One cannot escape the conclusion that if the regulation itself is void on its face it cannot be validly applied in fact as the Principal in this case sought to do.

But even accepting the district court's premise that the Principal's action in suspending the student because of his refusal to remove the emblem is not dependent upon the validity of the regulation, I still hold the view that the district court's conclusion that the student's constitutional rights were not infringed is wrong.

I do not in any way quarrel with the finding of the district court with respect to the tense racial situation and disturbances which disrupted the school in the 1969-70 school year. As the district court, as well as the special Citizens Committee, found, the disturbances which occurred during that year were provoked primarily because of the use of a number of official or semi-official school symbols which appeared to be offensive to a minority group of the students in the school, including (a) the name "The Rebels" to designate the school's athletic teams; (b) the song "Dixie"; and (c) the "Confederate Flag." No finding was made with regard to the individual wearing of shoulder patches or insignia. It was recommended by the Commit-

tee, followed by later approval by the Board of Education, that the name "Rebel" or "Rebels" be retained, but that the Confederate Flag as a school symbol and the use of the song "Dixie" as a school pep song should be discontinued. These recommendations were implemented as codes of conduct at each of the schools, including the provision with respect to "provocative symbols" which the district court has held to be invalid.

The evidence in this case clearly brings it within the ambit of *Tinker* v. *Des Moines School District*, 393 U.S. 503 (1969). It is my firm conviction that the Principal in suspending the student simply over-reacted and was motivated by the kind of "undifferentiated fear and apprehension of disturbance" which the court in *Tinker* held to be insufficient to overcome the right to freedom of expression. True enough, in this case the Principal was aware of the disturbances which had occurred during the prior school year, but he failed to take into account, in acting so hastily and precipitately, the following differentiating factors which appear to me to be of controlling significance:

1. The protests of the previous year were against a group of school symbols which by long usage and custom, if not by express official sanction, carried the impact of official sanction, whereas the wearing of the small sleeve insignia in this case by a single student could in no way represent an official ruling or have the appearance of doing so.

2. In the early part of the 1970-71 school year (in September) a football game was played by the school team when some students imprudently and in violation of the school's code of conduct waved Confederate flags, with no

resulting protests or outbreaks of violence, indicating a lessening of racial tension at the school.

3. In the interim between school years, the Board of Education, acting upon the recommendation of a citizens committee which had made an intensive study of the events of 1969-70, mandated the discontinuance at Brainerd of the song "Dixie" and the Confederate Flag as *school symbols,* but retained the designation of "Rebels" for the school's athletic teams. If such continued use officially of a term equally as suggestive of the Confederacy as the flag caused no disruption, it is difficult to conceive how the wearing of a confederate flag insignia could be seriously taken as disruptive.

4. There was no finding by the Committee that the wearing of confederate symbols on clothing by individual students as matters of personal choice had contributed to the previous trouble or that it should be prohibited for the future.

5. The complaints received by the Principal concerning this student's display of the Confederate Flag on his sleeve were, at best, minimal if not trivial.

6. As of the time this student was suspended there had been no acts of violence at the school and no significant threats of disruption, despite the continued "official" use of the team name "Rebels" and the events at the opening football game. There was every reason to believe that the official steps taken by the School Board in abolishing the school song and flag had satisfied the demands of those who protested the year before.

7. The nature of the "symbolism" in this case, (entitled under *Tinker* to the same reverence as "pure speech") is of significance: It was small; it was worn as a part of an article of clothing; and it had no inherent qualities for causing disruption or disturbance.

8. The emblem was worn by the student in a quiet, peaceful and dignified manner with no untoward gestures or remarks.[1]

9. The Principal conducted no substantial inquiry to ascertain the true facts as to whether the wearing of the insignia would lead to further trouble.

The fact is that despite the racial strife of the year before the circumstances were altogether different in the school year beginning in the fall of 1970, and there is no substantial basis to support the Principal's apprehension and fear that a small emblem worn by a single student on the sleeve of his jacket, which was merely symbolic of one of the historic facts of American life, would activate anew the kind of turmoil which had previously existed and which had been caused by entirely different circumstances. After all, it should be emphasized, the school symbols which were discontinued, such as the song "Dixie" and the Confederate Flag, at least bore the appearance of officialdom and could hardly be compared with the personal choice of a single student to decorate his jacket with a harmless emblem of the Confederate Flag.

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[1] There was evidence pro and con as to the student's conduct in connection with prior racial situations, but the district court made no finding, and the record justifies none, that he was a troublemaker or that he wore the insignia other than for the purposes stated by him. His stated purpose was to indicate his pride in his Confederate heritage.

The language of the Fifth Circuit in *Blackwell* v. *Issaquena County Board of Education*, 363 F.2d 744, 748 (1966), appears to me to be pertinent in the present context:

> . . . . Thus it appears that the presence of "freedom buttons" did not hamper the school in carrying on its regular schedule of activities; nor would it seem likely that the simple wearing of buttons unaccompanied by improper conduct would ever do so. Wearing buttons on collars or shirt fronts is certainly not in the class of those activities which inherently distract students and break down the regimentation of the classroom such as carrying banners, scattering leaflets, and speechmaking, all of which are protected methods of expressions, but all of which have no place in an orderly classroom. If the decorum had been so disturbed by the presence of the "freedom buttons," the principal would have been acting within his authority and the regulation forbidding the presence of buttons on school grounds would have been reasonable.

Since no question is made on appeal as to the validity of the district court's ruling in striking down the "provocative symbol" regulation, I would reverse the remainder of the judgment and remand the case with directions to modify the judgment below so as to grant the injunctive relief sought and for further proceedings on the issue of damages.

Order of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

No. 71-1704

FILED
Nov 21 1972

JAMES A. HIGGINS, Clerk

BRYAN MELTON and wife, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

Plaintiffs-Appellants,

—v.—

CORLEY R. YOUNG, *et al.* (Chattanooga, Tenn. Board of Education, Commissioner and Principal),

Defendants-Appellees.

(Petition for rehearing (with the suggestion for rehearing en banc), and motion to strike.)

Before:

MILLER, *Circuit Judge,* KENT, *Circuit Judge* and KEITH,* *District Judge.*

This cause is before the Court on the petition of Rod Melton, appellant, for a rehearing (with the suggestion that

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* Honorable Damon J. Keith, United States District Judge for the Eastern District of Michigan, sitting by designation.

the rehearing be en banc) of the opinion and decision of this Court rendered on August 30, 1972. If a rehearing en banc is denied, the appellant requests, in the alternative, a rehearing with Judge Keith "recused."

Inasmuch as the applicable time period has expired and there has been no request that there be a rehearing by a judge in regular active service or a judge who was a member of the panel that rendered the decision sought to be reheard, it is appropriate for this Court to deny the petition in its entirety. Rule 35(b), Fed. Rules App. Proc.

It is ORDERED that the petition for rehearing (with the suggestion that the rehearing be en banc) be and is hereby denied, and

It is ORDERED that the motion to strike is denied for frivolousness.

ENTERED BY THE ORDER OF THE COURT

JAMES A. HIGGINS
Clerk, United States Court of
Appeals, Sixth Circuit

Opinion of the United States District Court for the Eastern District of Tennessee

BRYAN MELTON, and wife, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

—v.—

CORLEY R. YOUNG *et al.*

Civ. A. No. 6018

United States District Court,
E. D. Tennessee, S. D.

June 19, 1971.

OPINION

FRANK W. WILSON, *Chief Judge.*

This lawsuit, involving the suspension of a high school student from a public school, presents two issues of federal constitutional dimension. One issue is whether a public school regulation forbidding students from wearing "provocative symbols" upon their clothing is violative of the First and Fourteenth Amendments. The second issue presented is whether the suspension of a student for refusal to cease wearing a shoulder patch consisting of a replica of the Confederate flag was violative of the First and Fourteenth Amendments under the circumstances shown to have been existing within the school at the time of the suspension.

At an initial hearing upon a motion for preliminary injunction held shortly after the suspension of the student, an understanding was reached whereby the student agreed to return to school without further wearing the Confederate

emblem pending a final decision of this lawsuit and the school authorities, who are the defendants herein, agreed that the return of the student to school under such circumstances would be permitted and would not constitute a waiver of any issues sought to be raised by the plaintiff in the lawsuit, nor would it render moot any such issue. A preliminary order was entered pursuant to this agreement of the parties.

It may appropriately be noted that although in the initial stages of this lawsuit the plaintiffs made certain contentions regarding denial of procedural due process and denial of equal protection of the law in connection with their son's suspension, at a pretrial conference the plaintiffs' counsel advised that in the interest of assuring a decision upon the merits of the plaintiffs' freedom of speech contentions made pursuant to the First and Fourteenth Amendments, the plaintiffs did not intend to pursue further their contentions regarding lack of procedural due process or denial of equal protection of the laws in the manner in which the suspension was accomplished. Furthermore, it appears to the Court from the evidence that the procedure by which the suspension was accomplished was fundamentally fair and regular and that there were no violations of either procedural due process or equal protection of the laws in connection therewith. As will be noted more fully hereinafter, the student was at all times fully advised as to the nature of the infraction with which he was charged and was afforded opportunities both for correction of the infraction and for hearings in connection with his suspension. The evidence is found insufficient to establish arbitrary action or discrimination in the suspension procedure followed.

The evidence in this case is voluminous and encompasses many matters that are of only peripheral relevance. Al-

though the parties filed extensive stipulations of fact, an additional five days was taken up in testimony. A substantial portion of the testimony now appears to have been repetitious of matters set forth in the stipulations.

The relevant facts appear to be largely undisputed and they are as follows: Brainerd High School is one of five public high schools operated by the School Board for the City of Chattanooga, Tennessee. At the time that a dual school system was being operated by the City for black and white students, Brainerd High School was operated as an all white school. During the period it was being so operated the student body had adopted the name "Rebel" as the school nickname and the practice had developed of using the Confederate flag as the school flag and the song "Dixie" as the school pep song. As a result of this Court's order, the school was desegregated in 1966 and since that time the student body has been composed of both races. At the commencement of the school year 1969 the racial composition of the student body consisted of 1,224 white students and 170 black students. During the initial years of desegregation there appears to have been no significant events within the student body tending to polarize the students along racial lines. Commencing with the opening of school in the fall of 1969, however, a series of events occurred which ultimately led not only to serious disruption within the school, resulting in the closing of the school upon two occasions in the spring of 1970, but also the disruption spread throughout the City of Chattanooga and resulted in a city-wide curfew being imposed in an effort to abate racial tensions and to restore order.

Whatever may have been the underlying causes and reasons for disharmony developing within the school, it is clear

that by the fall of 1969 the use of the Confederate flag as a school symbol, as well as the use of the song "Dixie" as the school pep song, had become an issue with a number of the black students. The first overt sign of this was a walkout by a number of black students at a school pep rally on September 9, 1969, in protest of the use of the Confederate flag and song. At a similar student pep rally on September 12, 1969, a larger group of black students walked out in protest of the symbol and song. On October 3, 1969, all black students walked out of a student pep rally, again in protest of the continued use of the flag and song. Up to this point the walkouts had been accomplished peacefully. At a school football game on the evening of October 3, 1969, however, serious trouble appears to have been narrowly averted when a group of black students left their seats in unison at the half time of the game and went upon the playing field where one or more of the students attempted to burn a Confederate flag. Police action was required on this occasion to restore order.

Polarization along racial lines now began to appear within the student body and altercations began to occur within the school with increasing frequency between black and white students. By this time students of both races appear to have been receiving outside encouragement for their respective positions regarding the school flag and song. The controversy over the flag and song were now spreading to the community.

On October 8, 1969, classes were disrupted for a period by a walkout of some 400 white students, soon followed by another 600 white students, in protest over reports that the Confederate flag and the song "Dixie" were to be dropped as the school symbol and pep song. Shortly before this

time, a student biracial committee had been established within the school and had suggested that the controversy over the school flag and song be resolved by a student vote. After some equivocation, this suggestion was rejected by school authorities.

On the evening of October 8, a sizeable motorcade drove through various parts of the City waving Confederate flags and otherwise expressing their partisanship. Also on this evening some 500 parents attended the School Board meeting to express their concern over the growing dissension at Brainerd High School and the apparent lack of effective disciplinary action.

During the night of October 11, 1969, a tense racial situation developed within the City when some 500 to 600 students and adults gathered in the Brainerd commercial area waving Confederate flags, singing "Dixie" and otherwise demonstrating their partisanship. In the meanwhile, a number of Negroes gathered nearby, likewise demonstrating their partisanship. Rocks and bottles were hurled at passing vehicles waving Confederate flags. A confrontation was avoided only after a number of arrests were made and after appeals were made by public officials to the crowds to disperse. In an effort to lessen the rising tensions within the City and to head off further racial confrontations, a city-wide curfew was imposed for four nights, from October 13 through October 17, 1969.

Throughout the remainder of the fall semester, considerable racial tension existed within the student body. Nighttime athletic events were rescheduled to be held in the afternoon. Sporadic fighting occurred between students of different races and some students were suspended from school. In January of 1970 a new principal, Dr. B. L. Von Schaaf,

was assigned to the school and a number of steps were taken to tighten discipline within the school.

During the spring of 1970 racial incidents continued to occur at the school and racial tensions continued to mount. On April 14, 1970, a major confrontation between black students and white students developed in the school cafeteria. Although this was broken up by school authorities without a fight having developed, the black students then refused to return to their classes for a time. When school was let out that afternoon, another major confrontation developed between the black and white students in the schoolyard, requiring the calling of some 40 policemen to restore order. Nine students were arrested upon this occasion.

The following day, April 15, racial tensions and racial incidents continued to mount. Black students gathered in the hallways and refused to go to classes. They stated that they were dissatisfied with school social clubs and extracurricular activities and would not be a part of the school so long as it maintained its present school symbols. Two fires of undetermined origin were discovered and put out in the school auditorium. It was again necessary to call a large number of police to maintain order and several altercations between students and police occurred. In an effort to restore order and to lessen tensions, it was announced that the school would be closed for the next two days, April 16 and 17. However, when classes were resumed the following week, racial turmoil promptly broke out again, resulting in student confrontations in the hallway, students refusing to go to class, fights, rock throwing, and other destructive actions being committed. Again a large number of police were called onto the campus, this time supported by city firemen. By April 22, 1970, it became necessary once

again to close the school, this time not to be reopened until April 28, 1970. In the meanwhile, extensive plans were made for further tightening school discipline, reassuring the faculty, who by this time had become concerned for their own safety, and otherwise planning for the reopening of the school.

Up to this time only a rather limited number of students had been suspended from school for participation in the disorders, the reason given being that in most instances group action was involved and individual responsibility could not be placed. However, for the remainder of the term a substantial number of suspensions were made for infraction of school rules. In addition, many regular school activities were curtailed, particularly those scheduled to occur in the evening or off of school premises.

In the latter part of May 1970, a committee of nine prominent citizens was appointed by joint action of the school administration and the Brainerd High School P.T.A. This committee was assigned the task of reviewing the problems besetting the School throughout the past year and recommending corrective action for the following year. After extensive investigations the committee filed a report identifying seven factors as having been most significant in contributing to the tensions and disorder in the School during the past year. One such factor so identified was the symbolism being used by the School, or, more specifically, the nickname "Rebel," the Confederate flag, and the song "Dixie." Regarding these the committee stated: "The focal point of the single factor most discussed was the problem of symbols, that is, (a) the name 'Rebel,' (b) the song 'Dixie,' and (c) the Confederate flag." Regarding school symbols, the committee recommended that the name "Rebel" be retained, but that use of the Confederate flag as a school

symbol and use of the song "Dixie" as a school pep song be discontinued.

This portion of the committee's report along with other portions, were approved and adopted as school policy by the School Board at its meeting upon July 8, 1970. The School Board further directed at that time that prior to the opening of school in September 1970 the principal in each school within the system develop a code of student conduct and make distribution of the same at the opening of school. In response to this directive, Dr. Von Schaaf and his staff revised and implemented a code for student conduct that initially had been developed in the spring of 1970. Among other rules contained in this code was the following: "Also, provocative symbols on clothing will not be allowed."

At the opening of school in the latter part of August 1970, orientation sessions were held at Brainerd High School, both with students and with their parents, and the above named rules, along with other information, were distributed and discussed. At the same time students and parents were advised as follows: "According to the Board of Education July 8, 1970 meeting, the status of symbols for Brainerd High School is as follows: 'The Confederate flag and Confederate soldier cannot be used as symbols for any public school in Chattanooga; therefore, all displays of the flag and soldier are removed from the school premises and cannot be used in any display where Brainerd is involved.'" The plaintiff, Rod Melton, as well as his parents, who are also plaintiffs, were advised of these matters at that time and received copies of the rules and of the other information referred to.

So much by way of background. Turning to the immediate facts giving rise to this lawsuit, the following relevant matters appear largely, if not wholly, undisputed in the

record: The plaintiff, Rod Melton, first entered Brainerd High School during the year 1969. He was in the junior class during the school year 1969-70, and attended school throughout that year. He was present as a witness to many of the events indicated above and was himself involved upon one or more occasions, at least to the extent of separating the combatants. He also received a short disciplinary suspension from school during the year for wearing an outer garment with a cross and the letters "KKK" upon it.

On September 8, 1970, the plaintiff, Rod Melton, wore a jacket to school having an emblem depicting the Confederate flag sewn on one sleeve. During the course of the morning the matter was reported to Dr. Von Schaaf by a faculty member and the plaintiff was sent to the principal's office. He was there requested by the principal to remove the emblem or cease wearing the jacket while attending school, but he declined to do so. He was allowed to return to his class, but further complaints were received from both the faculty and students, including some six or ten black students, regarding his being allowed to wear the Confederate emblem in school. The principal thereupon again called the plaintiff to his office and requested that he remove the jacket, but the plaintiff again declined to do so. Stating that the emblem was provocative in his judgment and that it was a violation of the school code, Dr. Von Schaaf directed that the plaintiff either remove the jacket or leave the campus. He elected to leave campus.

The following day, September 9, 1970, the plaintiff, Rod Melton, again appeared at Brainerd High School wearing the same jacket with the Confederate symbol sewn on the sleeve. Once again he was sent to the principal's office and instructed to remove the jacket or the emblem. Again he

declined to do so, representing that his purpose in wearing the Confederate symbol on his jacket was merely to demonstrate his pride in his Confederate heritage and not for any other purpose. He was thereupon instructed to leave school and not return until he was willing to cease displaying the Confederate emblem on his clothing while in school. On the occasion of his suspension both upon September 8, 1970, and upon September 9, 1970, letters were sent by the principal to Rod Melton's parents advising them of the action taken and the reasons therefor. Further conferences were held between the principal and Mrs. Melton, but no resolution of the matter was reached. Thereupon this lawsuit was filed.

The foregoing is an abbreviated statement of the voluminous evidence placed in the record in this case. However, it is believed to adequately state the facts essential to the decision of the case. Each of the parties introduced considerable other evidence which at most was only of limited relevance. Among such evidence introduced by the plaintiffs was the following: (a) that the Confederate flag, rather than standing for slavery and the degradation of the black race, is an honored emblem standing for bravery and other patriotic virtues; (b) that little or no effort was made by school authorities to educate black students to the true meaning of the Confederate flag; (c) that black students were incited by black militants to protest the Brainerd High School symbols in the fall of 1969; (d) that the failure of school authorities to use firm discipline, particularly in the early stages of black student protests, was a contributing factor to matters getting out of hand at later stages in the year; and (e) that other symbols of a provocative nature, such as the black fist, the Afro hair style, and the peace symbol, were permitted to be worn or displayed by students on

the school premises. On the other hand, the defendants, in addition to going into extensive detail regarding each of the events recounted above, sought to introduce evidence that the plaintiff, Rod Melton, had engaged in activities on other occasions, both prior to and subsequent to his suspension, reflecting a strong partisanship in racial matters. The plaintiffs introduced rebutting proof on these matters and sought to show that young Melton was a well behaved and honor student.

As stated, the Court is of the opinion that each of the foregoing matters is only of limited relevance. There would appear to be no genuine relevance between the plaintiff's racial attitudes as expressed on other occasions and whether his right to free expression was curtailed on September 8 and 9, 1970, to an extent not permitted by the Federal Constitution. The plaintiffs' contentions regarding black aggression in placing the school symbols in controversy and regarding the alleged failure of the School to educate black students in regard to the school symbols or to discipline them in their protests against the symbols do not alter the fact that school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970. Nor do these contentions of the plaintiffs alter the fact that much of the controversy the previous year had centered around the use of the Confederate flag as a school symbol. To the extent that the plaintiffs may contend that prior errors in school administration limited the principal in taking corrective action in September of 1970, the contention is clearly without merit. The principal was confronted with the assignment of operating the school under the facts as they existed in September of 1970, regardless of how those facts might have been changed had no prior errors been committed. When applied

on a larger scale, such reasoning would lead to the assertion that had no errors been committed prior to 1860, no Civil War would have occurred, with the consequence that no Confederate flag would have come into existence. "Dixie" would have remained a minstrel song, and the word "rebel" would have remained a generic word.

Before turning to the two specific constitutional issues presented in this case, certain general propositions of law should be noted. First and foremost of these is the specific relevant language of the First Amendment wherein it is provided: "Congress shall make no law • • • abridging the freedom of speech • • • " Although the language of the First Amendment is a limitation upon the power of Congress, the principle is now firmly established that the concept of due process as contained in the Fourteenth Amendment incorporates all of the fundamental rights contained within the First Amendment, including freedom of speech, and accordingly forbids any state abridgement thereof. Tinker v. Des Moines, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969); Talley v. Calif., 362 U.S. 60, 80 S.Ct. 536, 4 L.Ed.2d 559 (1960). Whenever any public body acts so as to injure the person or property or restrict the freedom of an individual, the Constitution requires that such action be consonant with due process of law. As noted, the First Amendment does not speak equivocally, but rather is broad and explicit in its scope. Regulatory measures, no matter how well intentioned or how sophisticated, cannot be employed by public bodies if their purpose or effect is to stifle, penalize, or curb the exercise of rights guaranteed by the First Amendment.

Upon the other hand, it should likewise be noted that the right of free speech is one of many rights guaranteed by the Constitution and accordingly must be interpreted in

harmony with and so as not to infringe upon other rights equally secured by the Constitution. That is, freedom of speech is not an absolute right. Terminiello v. Chicago, 337 U.S. 1, 69 S.Ct. 894, 93 L.Ed. 1131, reh. den. 337 U.S. 934, 69 S.Ct. 1490, 93 L.Ed. 1740 (1948). The exercise of free expression must on occasion be subject to some limitations, otherwise such institutions as churches, schools, and other places of public assembly, not to mention the courtrooms themselves, would become Towers of Babel. Under the Constitution Society has an interest in free expression. Under the same Constitution Society also has many other interests, including the operation of schools. Wholly apart from any incitation, no thoughtful person would suggest that a student should be permitted to stand and sing "Dixie" in a classroom as the mood might strike him, nor even to recite the Oath of Allegiance in so unregulated a manner. Reasonable and non-discriminatory regulations of time, place, and manner are always permissible restrictions upon expression. Expression can never be limited, however, merely because of disagreement with or dislike for its content.

Finally, it should be noted that "symbolic speech," although not always readily distinguishable from conduct and accordingly somewhat ill-defined in the law, is accorded First Amendment protection the same as "pure speech." See Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), wherein the Court held that wearing of arm bands "is closely akin to 'pure speech.'" See also Cox v. Louisiana, 379 U.S. 559, 85 S.Ct. 476, 13 L.Ed.2d 487 (1965); Hodsdon v. Buckson, 310 F.Supp. 528 (D.C. Del. 1970).

Turning to the specific constitutional issues presented for decision in this case, the Court must first decide whether

a public school regulation forbidding students from wearing "provocative symbols" upon their clothing under penalty of possible suspension from school is violative of the First and Fourteenth Amendments. The specific regulation here involved provides: "Also, provocative symbols on clothing will not be allowed." Although elsewhere in the regulations Confederate symbols were barred from use as school symbols and although there is evidence that the words "provocative symbols" were construed by the school principal to mean "that which would cause a substantial disruption of the student body," such an interpretation is subjective to the principal, for nowhere in the regulatory scheme are the words "provocative symbols" defined.

Vague laws or regulations in any area are likely to suffer a constitutional infirmity. The likelihood of constitutional infirmity is greatly enhanced where First Amendment rights may be affected by the laws or regulations. As stated by the Court in the case of Ashton v. Kentucky, 384 U.S. 195, 86 S.Ct. 1407, 16 L.Ed.2d 469 (1966): "Vague laws in any area suffer a constitutional infirmity. When First Amendment rights are involved, we look even more closely lest, under the guise of regulating conduct that is reachable by the police power, freedom of speech . . . [may] suffer."

Accordingly, precision and specificity are essential to the validity of a public law or regulation affecting freedom of speech if the law or regulation is to pass constitutional muster under the First and Fourteenth Amendments. In this regard, see Keyishian v. Board of Regents of University of State of New York, 385 U.S. 589, 87 S.Ct. 675, 17 L.Ed.2d 629 (1967), wherein the Court stated:

> "We emphasize once again that 'precision of regulation must be the touchstone in an area so closely touching

> our most precious freedoms, * * * for standards of permissible statutory vagueness are strict in the area of free expression * * * Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.' "

The word "provocative" is defined by Webster to mean "serving or tending to provoke, excite, stimulate, or incense * * * especially to stir up controversy or discussion." Accordingly, under any such definition, the words "provocative symbols" may encompass an almost limitless number and variety of symbols. The barring of "provocative symbols" under penalty of possible suspension from a public school is clearly too vague, broad, and imprecise a regulation to be allowed to stand before the requirements of either the First or the Fourteenth Amendments. As emphasized in the case of Tinker v. Des Moines Independent Community School District, *supra,* limitations on the use of symbols or other activity closely akin to "pure speech" are permissible only in carefully restricted circumstances. The prohibition of all "provocative symbols" is clearly beyond these restrictive bounds. See also Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1930).

The striking of the "provocative symbols" regulation from the Brainerd High School student code does not resolve all issues in this lawsuit. Although the principal cited the regulation in support of his action in ordering the plaintiff to remove the Confederate flag shoulder emblem while attending school on September 8 and 9, 1970, the validity of the principal's action in ordering the removal of the emblem or in suspending the plaintiff upon his refusal to do so is not dependent upon the validity of the regulation. A public school principal is charged under

Tennessee law with the responsibility for the operation of the school to which he is assigned. His authority in this regard is commensurate with his charge. See T.C.A. § 49-1309; Phillips v. Johns, 12 Tenn.App. 354 (1930). A public school principal is responsible for maintaining such discipline and order within the school as will permit the educational processes to be carried out. His plenary authority in this regard is not dependent upon the adoption of a written code of student conduct in each school, although the latter may be the desirable practice.

Accordingly, there remains for decision the issue of whether the suspension of a student for refusal to cease wearing a shoulder patch consisting of a replica of the Confederate flag was violative of the First and Fourteenth Amendments under the circumstances shown to have been existing within Brainerd High School at the time of the suspension.

As previously noted, the right of free expression is not absolute or without limits. For one thing, reasonable and non-discriminatory regulation of time, place, and manner are permissible. Another limitation, historically speaking, is that permitted by the clear and present danger rule. The usual statement of law in this regard is that a limitation of free speech may be permissible if it is justified by clear public interest, threatened not doubtfully or remotely, but by clear and present danger. In this regard see Schenck v. United States, 249 U.S. 47, 39 S.Ct. 247, 63 L.Ed. 470 (1918), wherein Justice Holmes made his classic observation that "The most stringent protection of free speech would not protect a man in falsely shouting *fire* in a theatre and causing a panic."

More specific to the problem here presented, however, are the principles and guidelines laid down in the recent

case of Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). The facts there presented were that students were suspended from a public school when they refused to remove black armbands worn in protest against the war in Viet Nam, the wearing of such armbands being a violation of a school regulation directed specifically thereto. The Court held that the First Amendment right of freedom of speech was available to teachers and students within the schoolhouse as well as without and that the wearing of black armbands by the students as a symbolic act, entirely divorced from actually or potentially disruptive conduct, was closely akin to "pure speech" and therefore entitled to comprehensive protection under the First Amendment. The Court concluded that, upon the record presented, the action of the school authorities appeared to have been based upon the desire to avoid controversy in that there was no evidence that the school authorities had any reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students or that the prohibition was necessary to avoid material and substantial interference with school functions. Holding that a student may express controversial opinions so long as he does so without materially and substantially interfering with appropriate discipline in the operation of the school and without abridging the rights of others, the Court struck down the armband regulation as violative of the First Amendment.

Relying significantly upon two Fifth Circuit cases decided in 1966 (Burnside v. Byars, 363 F.2d 744, and Blackwell v. Issaquena County Board of Education, 363 F.2d 749) in one of which a school regulation banning the wear-

ing by students of civil rights freedom buttons was stricken down and in the other of which the same regulation was sustained because of differing circumstances prevailing in the two schools, the Supreme Court used the following language that is of particular relevance to the facts of the principal case:

> "A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without 'materially and substantially interfering with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others. Burnside v. Byars, *supra,* 363 F.2d at 749. But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place, or type of behavior—materially disrupts class work or involves substantial disorder or invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech. Cf. Blackwell v. Issaquena County Board of Education, 363 F.2d 749 (5th Cir. 1966)."

Unlike the *Tinker* case, where the Court found no evidence of either actual or potential disruptive conduct, but only an "undifferentiated fear or apprehension of disturbances," the record in the present case reflects quite clearly that there was substantial disorder at Brainerd High School throughout the 1969-70 school year, that this disorder most materially disrupted the functioning of the school, so much so that the school was in fact closed upon two occasions,

that much of the controversy the previous year had centered around the use of the Confederate flag as a school symbol, and that the school officials had every right to anticipate that a tense racial situation continued to exist as of the opening of school in September of 1970. Under these circumstances Brainerd High School officials were not required to wait until another disruption occurred before restricting the use of the symbol previously found to have caused the disruption or to have contributed to the causing of the disruption.

In the recent case of Guzick v. Drebus, 431 F.2d 594 (1970), a case decided since the *Tinker* decision, the Court of Appeals of this Circuit, after discussing the *Tinker* case, upheld a public school no-symbol rule. In so doing, the Court stated, among other matters, the following:

> "In our view, the potentiality and the imminence of the admitted rebelliousness in the Shaw students support the wisdom of the no-symbol rule. Surely those charged with providing a place and atmosphere for educating young Americans should not have to fashion their disciplinary rules only after good order has been at least once demolished."

The suspension of the plaintiff by the principal of Brainerd High School for refusing to cease wearing, while at school, a Confederate flag as a shoulder patch, was not based merely upon the principal's disagreement with nor dislike for the symbol. On the contrary, the principal stated he had no personal objection to the symbol. Nor was it prompted by a mere desire on the principal's part to avoid the discomfort and unpleasantness that often accompany a controversial viewpoint. Rather, the evidence in this

case is quite overwhelming that the Confederate symbol had been a cause of very serious, material and substantial disturbance in the school throughout the previous school year. The principal had every right to anticipate that a tense racial situation continued to exist at Brainerd High School as of the beginning of school in September of 1970 and that repetition of the previous year's disorders might reoccur if student use of the Confederate symbol was permitted to resume. Restricting the use of the Confederate symbol within the school under the circumstances existing within Brainerd High School at the time of the plaintiff's suspension accordingly was not violative of the First and Fourteenth Amendments.

An order will enter in accordance with this opinion.

A few further words seem appropriate. Our schools are living through difficult and controversial times. In the midst of our present trials, it would be a grievous error for us to forget that this Nation and its institutions have survived other difficulties and other controversies. In times past our Nation and its institutions have drawn strength and not weakness from those difficulties. In times past our Nation and its institutions have drawn unity and not divisiveness from those controversies. After one of the most difficult and angry political contests within the history of this Nation, President Jefferson had the following to say in his first inaugural address. They are words which all of us, in our present difficulties, should take to heart, including students of both races at Brainerd High School.

> "During the contest of opinion through which we have passed, the animation of discussion * * * has sometimes worn an aspect which might impose on strangers unused to think freely and to speak and to write what

they think, but this being now decided by the voice of the Nation, announced according to the rules of the Constitution, all will, of course, arrange themselves under the will of the law and unite in common efforts for the common good. All, too, will bear in mind this sacred principle, that though the will of the majority is in all cases to prevail, that will, to be rightful, must be reasonable; that the minority possess their equal rights which equal law must protect, and to violate which would be oppressive. Let us then, fellow citizens, unite with one heart and one mind. Let us restore to social intercourse that harmony and affection without which liberty and even life itself are but dreary things."

Judgment of the United States District Court

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF TENNESSEE
SOUTHERN DIVISION

Civil Action No. 6018

BRYAN MELTON, *et al.*

—VS.—

THE BOARD OF EDUCATION OF CHATTANOOGA, TENNESSEE, *et al.*

ORDER

This lawsuit, challenging the suspension of a high school student from a public school, presents two issues of federal constitutional dimension. One issue is whether a public school regulation forbidding students from wearing "provocative symbols" upon their clothing is violative of the First and Fourteenth Amendments. The second issue is whether the suspension of a student for refusal to cease wearing a shoulder patch consisting of a replica of the Confederate flag was violative of the First and Fourteenth Amendments under the circumstances shown to have been existing within the school at the time of the suspension.

Having considered the evidence presented at the hearing upon this matter, the stipulations of fact and the briefs of the parties and for the reasons set forth in an opinion filed herein, the Court enters the following orders.

It is accordingly ORDERED:

(1) That such portion of the Brainerd High School, Chattanooga, Tennessee, student conduct code as provides: "also provocative symbols on clothing will not be allowed." will be stricken and for nothing further held, the same having been found by the Court to be so broad, vague and imprecise as to violate the First and Fourteenth Amendments of the Federal Constitution;

(2) That the suspension of the plaintiff, Rod Melton, from Brainerd High School, Chattanooga, Tennessee, upon September 8 and 9, 1970, for refusal to cease wearing a shoulder patch consisting of a replica of the Confederate flag was not violative of either the First or Fourteenth Amendment or of any other provision of the Federal Constitution under the circumstances existing within the said school at the time of the suspension; and

(3) That except as hereinabove provided the plaintiffs be and they hereby are denied further relief with the costs of this cause being taxed unto the plaintiffs. This will constitute the final order of the Court in this case.

APPROVED FOR ENTRY.

FRANK W. WILSON
United States District Judge

FILED
MAR 16 1973

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-1142

BRYAN MELTON and wife, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

Petitioners,

vs.

CORLEY R. YOUNG, MRS. C. M. HOOPER, REV. H. H. BATTLE, JAMES L. JENKINS, G. PAUL SAMS and WILLIAM D. LEBER, The Board of Education of Chattanooga, Tennessee, S. DEAN PETERSEN, Commissioner of the Board; DR. B. L. VON SCHAAF, Principal of Brainerd High School, Chattanooga, Tennessee,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RAYMOND B. WITT, JR.
JOHN W. MURREY, III

WITT, GAITHER, ABERNATHY & WILSON

1100 American National Bank Building
Chattanooga, Tennessee 37402

Attorneys for Respondents

COURT INDEX PRESS, INC. — 609 Walnut Street, Cincinnati, Ohio 45202 — (513) 241-1480

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1972

No. 72-1142

BRYAN MELTON and wife, MRS. BRYAN MELTON, on behalf of their minor son, ROD MELTON,

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Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondents accept Petitioners' statement of jurisdiction but cannot accept their statement of the question presented or statement of the case.

QUESTION PRESENTED

Whether the suspension of a student at Brainerd High School for refusal to cease wearing a shoulder patch consisting of a replica of the Confederate flag was violative of

the First and Fourteenth Amendments to the United States Constitution under the circumstances shown to have been existing within the school at the time of such suspension.

STATEMENT OF THE CASE

From 1966 until the opening of school in 1969, Brainerd High School in the City of Chattanooga had undergone a gradual transition from an all white school to a desegregated one. The student body had previously adopted as the school nickname the name "Rebel" and a custom had developed of using the Confederate flag as the school flag and the song "Dixie" as the school pep song. Commencing with the opening of school in the fall of 1969, a series of events occurred which ultimately led to serious disruption within the school, resulting in the closing of the school upon two occasions in the spring of 1970, and further led to disruption throughout the City of Chattanooga, resulting in a city-wide curfew being imposed in an effort to abate racial tensions and to restore order. [App. p. 18a]* The use of the Confederate flag as a school symbol and the song "Dixie" as a school pep song was the focal issue in all of the disturbances. [App. p. 18a-19a]

The first overt sign of student discontent appeared when a number of black students walked out of a school pep rally in September of 1969, to protest the use of the Confederate flag and song "Dixie." The black students in ever increasing numbers continued to walk out of pep rallies until on October 3, 1969, *all* of the black students walked out of a student pep rally, again protesting the continued use of the flag and song. At a school football

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* "App. —" refers to the appendix of Petitioners' petition for writ of certiorari. "P.I. —" refers to the preliminary injunction hearing. "T.T. —" refers to the transcript of trial. "S.F. —" refers to the stipulation of facts agreed to by the parties.

game on the evening of October 3, 1969, a serious confrontation occurred when a group of black students left their seats in unison at halftime and went upon the playing field, and there attempted to burn a Confederate flag. Police action was required to restore order. [App. p. 19a; S.F. sec. I para. (2), (3), (4), (6), (8)]

Thereafter, the student body continued to polarize along racial lines as the black and white students generally took contrary positions with reference to the continued use of the flag and song within the school.[1] On October 8, 1969,

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[1] The petitioners have made an effort to depict the school protest as one involving only official school symbols as contrasted to the personal wearing of such symbols; however, the record clearly reflects that the students' feelings and protests went beyond this official use only. For instance, at the trial Dr. Claude Bond, an assistant superintendent, testified as follows:

Q. Have you heard the black students discuss their reaction to the song Dixie? A. Yes. Q. What is the reaction of the black students to the confederate flag? A. Well, most of the ones that I have heard make comments about it was during the time we were having trouble at Brainerd last year and I met with them on one or two occasions at the invitation of the principal to try to get them to go back to school, back to class, and they were voicing their sentiment about the Rebel flag and Dixie and a whole gamut of concerns. Q. What were their concerns? A. Well, they felt that the white students were using this as a provocative way to indicate to them that they did not want them to be a part of the school and this was their way of saying to them, "We don't want you to be here." And they used the flag, this is the students' idea now, that they used the flag and as a thing that they retaliated by using the Black Fist and this kind of thing. [T.T. p. 46 & 47]

Alma Barnett, a black Brainerd student involved in the prior year's disruptions, testified as follows:

Q. Do you think white children should have a right to wear a Confederate emblem on the sleeve of their jackets? A. To school? Q. Yes. A. Not at Brainerd High School, I don't. Q. Why? A. Because the symbols have been used heretofore as a source of irritation and aggravation towards blacks and to wear them now would be, it would mean the same thing and for this to go — we can't possibly learn, the atmosphere would be too tense and the learning process could not

approximately 1,000 white students walked out of the school in protest over rumors that the use of the flag and song were to be discontinued at the school. The controversy then spread throughout various parts of the City. Motorcades, displaying Confederate flags moved throughout the area on October 8, and thereafter and, in addition, public rallies were held in the Brainerd area on various occasions. Parents joined in protest at a school board meeting and some reported incidents of threats and physical assaults having occurred at Brainerd High School. In an effort to prevent the rising tide of racial disturbances, the City imposed a city-wide curfew that ultimately continued from October 13 through October 17, 1969. [App. 19a-20a; S.F. sec. I, paras. (9), (15), (16), (17), (21), (24), (26), (29), (33), (36)]

Throughout the remainder of the fall semester, Brainerd continued in a racially tense atmosphere. Nighttime athletic events were rescheduled. Sporadic fighting occurred between students of different races. Many students were suspended from school. [App. 20a]

In January of 1970, a new principal, Dr. Billy L. Von Schaaf, was assigned to the school and a number of steps were taken to tighten discipline within the school; however, during the spring of 1970, racial incidents continued

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exist so, therefore, I don't think that they should be allowed to wear them at Brainerd. Q. Because the flag is forced on your eyesight, is that what you are saying? A. No, because it was used to irritate and aggravate. Q. I say, were you compelled to look at it? A. This was not why I was irritated by it, because I had to see it, it was the way it was used. Q. How was it used? A. Well, it was used — well, like in this individual instance, like it was waved in front of blacks' faces and it was worn by those who called me, personally called me names, names that were offensive to me, and I hadn't any used before, before the Brainerd, you know, situation, I hadn't seen it used offensively. Q. You are saying not the flag but how it is used? A. Yes. Well, the flag itself represents something offensive but the way that it was used represents something even more offensive. [T.T. pp. 96 & 97]

to occur at the school and racial tensions continued to mount until on April 14, 1970, a major confrontation occurred between the black and white students. Some 40 policemen were required at the school to restore order and some 9 students were arrested upon this occasion. On the following day, the racial trouble continued. Two fires of undetermined origin were discovered and extinguished in the school auditorium. Again, it was necessary to utilize as many as 40 policemen to restore order at the school and to patrol the school corridors and halls. The situation became so tense that it was necessary to close the school for the following 2 days. When classes resumed the following week, racial turmoil promptly broke out again, resulting in protests, fights, rock throwing and other destructive actions. On April 22, 1970, the situation became so tense that the police present at the school had to request reinforcements in order to maintain order and a total of approximately 50 policemen were needed for this purpose. The school was again closed for the remainder of the week and full classes did not resume at the school until 8 days later on April 30, 1970. The Board of Education met each day from April 22 through April 27, and at their meeting on April 27, they authorized the Superintendent to request the National Guard at Brainerd High School when and if he in his discretion determined such to be necessary. From April 30, 1970, until the close of school, many regular school activities were curtailed or omitted entirely and numerous minor conflicts and incidents continued to occur between the students. The suspension rate at the school ran as high as 35 to 40 students at a time. [App. 20a-22a; S.F. sec. I para. (39), sec. II para. (1), (2), (3), (4), (6), (7), (8), sec. VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI]

Throughout the year many students wore Confederate symbols on their attire under the pretext that they were

the official school symbols. Therefore, the black students' protest was generally directed against the symbols as official symbols. However, efforts were made to curtail this wearing of personal symbols and some complaints were directed to this type of conduct.[2]

In the latter part of May, 1970, a biracial committee of 9 prominent citizens was appointed by a joint action of the school administration and the Brainerd High School PTA for the purpose of reviewing the problems besetting the school and recommending means of alleviating some of the tenseness within the school. After an extensive investigation, the committee identified 7 factors having been most significant in contributing to the tensions and disorders during the previous school year, and recommended the elimination of the use of the Confederate flag as a school symbol, and the use of the song "Dixie" as a school pep song. Their recommendation was accepted by the Chattanooga Board of Education. Thereafter, the students and parents of the school were advised prior to the opening of school in 1970 that "The Confederate flag and Con-

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[2] Ray Coleman, former Brainerd High School principal, testified as follows:

Q. None of the black students ever objected to this sort of attire? A. Yes, on one or two occasions. I had, after some demonstrations in the community related to the Confederate flag, I had appealed to the students not to wear the symbols during the regular school day and that there was a possibility that they would be accused of doing something that we felt that outsiders were doing in using the symbols, if they truly felt it was a symbol of the school that we would refrain from using it in the school and not utilize it unless it was an athletic contest or pep rally.

So most of the students cooperated but I did have one or two occasions where a black student would point out some student was wearing a flag or a white student would point out a black student was wearing a black fist of some sort, but it was very minimal, they were very cooperative in trying to refrain from utilizing them during this period. [T.T. p. 513-514]

federate soldier cannot be used as symbols for any public school in Chattanooga; therefore, all displays of the flag and soldier are removed from the school premises and cannot be used in any display where Brainerd is involved." [App. p. 22a-23a]

Prior to the opening of school in the latter part of August, 1970, elaborate preparations and orientation sessions were held at Brainerd High School in an effort to prepare the school for a peaceful opening and to advise the students of the implementation of certain new school policies including the adoption of a new code of conduct which banned the wearing of provocative symbols at the school. Dr. Von Schaaf and other responsible persons knew that the elimination of the Confederate flag and song "Dixie" as official school symbols by the school board was not a panacea. They anticipated and had every right to anticipate that a tense racial situation would continue to exist at the opening of school in September of 1970.[3] [App. p. 23a; S.F. sec. IV para. (3); T.T. p. 373-382]

Though there was grave concern about possible racial

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[3] For instance, Dr. Von Schaaf testified as follows:

Q. Have you detected, Dr. Von Schaaf, in your confrontations at Brainerd any attitude of dissatisfaction among the white students for their not having their customary symbol this whole year? A. I have detected quite a bit. [T.T. p. 477]

McClellan Cook, then President of the Brainerd PTA and subsequent member of the Chattanooga Board of Education, testified as follows:

A. And we were all very uneasy when school opened concerning the pep rallies and when you have bitterness in feelings that result from incidents of these types you just don't wipe the slate clean and start all over, and so the deep concern was to try to prevent an incident from occurring which could provoke and cause escalation, renewing or re-opening the wounds and renewing the conflict, but it takes time, it takes a lot of time for these things to work themselves out. [T.T. p. 203-204]

conflicts at the first football game to be held prior to the opening of school, all such conflicts were averted.[4]

On September 8, 1970, the plaintiff, Rod Melton, attended school wearing a jacket with an emblem sewn on one sleeve depicting the Confederate flag. During the morning this matter was called to the attention of Dr. Von Schaaf by a faculty member and he promptly requested that Rod either remove the emblem or cease wearing the jacket while

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[4] Dr. Von Schaaf testified about this matter as follows:

Q. Did you receive any reports with reference to the use of the Confederate flag and the first football game in September of 1970? A. Several people said that at the first ball game we would probably have a thousand Confederate flags present and, of course, we were apprehensive about this, not only did we have this kind of rumor floating about, we also had a rumor that if there was going to be a thousand Confederate flags that there was going to be a massive group of black people ready to retaliate. [T.T. p. 374]

Q. Were many Confederate flags in evidence at the Howard football game? A. I saw only two or three Confederate flags. Q. Could you identify any of the persons that were using or that had the Confederate flags in their possession? A. Yes, Mrs. Melton, Rod, Rick Cooper, and I believe there was one other boy, I don't recall. Q. Then this was about a week prior to September the 8th, approximately. After you made the decision to limit the use of the Confederate flag at football games, did you make any preparations to be able to enforce this restriction? A. Yes. We hired additional police on more than one occasion. We felt like that we might have to have more policemen present on the situation than we normally had.

We were fortunate in one sense of the word that in the early games of the year, not as many black students attended the ball games as had normally attended the ball games and this lessened the degree of conflict to some measure, but we did have extra policemen on duty for these ballgames. [T.T. p. 382-383]

McClellan Cook testified as follows:

Q. Do you recall that Howard High — Brainerd football game in September of 1970? A. Yes, sir. Q. Did you have any concerns about this game? A. I was scared to death. Q. Why? A. I knew the feelings of the white community and the white students over the loss of Dixie and the flag and I feared that there would just be thousands of flags show up at that ball game and blow the whole thing up again. [T.T. p. 225-226]

attending school. Rod declined to do so and was allowed to return to class. Thereafter, further complaints were received from both the faculty and students regarding his being allowed to wear the Confederate emblem in school.[5] Dr. Von Schaaf thereupon offered Rod the choice of removing the jacket or leaving the campus. Rod elected to leave the campus. [App. p. 24a; S.F. sec. IV para. (1), (2)]

The next day, Rod again appeared at school wearing the same jacket with the Confederate symbol sewn on the sleeve. The principal again extended the same choice to Rod and Rod promptly elected to leave the campus. On each occasion Dr. Von Schaaf had determined that to allow Rod to continue to wear the Confederate symbol at school would result in substantial disruption of the educational process and would sooner or later if allowed to continue result in acts of violence followed by possible physical injury to members of the student body. [App. p. 24a-25a; S.F. sec. IV para. (1), (6)]

Rod's avowed purpose in wearing the symbol to school was to "show that the Confederate flag has not been done away with" and to show he "was proud of" his Confederate heritage. [P.I. p. 4, 8-9] He was known to the black students at Brainerd High School and had been involved on more than one occasion in racial incidents. He had been present at many of the events that occurred in the previous year at Brainerd and he had been suspended from school during that year for wearing an outer garment bearing a symbol of the Ku Klux Klan. He was involved

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[5] Two assistant principals reported to Dr. Von Schaaf that they had received complaints from both members of the student body and faculty. One assistant principal reported receiving complaints from approximately 6 to 10 black students to the effect that they could see no reason why Rod would wear the Confederate symbols unless it was to alienate them. [S.F. sec. IV para. (1), (2)]

in the separation of black and white girl combatants on two occasions and on each occasion he was accused of being overly rough with the black girl involved. In addition, he commenced a book report in class by stating that the author had scientific proof that Negroes as a group had smaller brains than whites and were less capable of learning. On another occasion subsequent to the opening of school in 1970, he purposely marred an art exhibit of a black student. [App. p. 24a; S.F. sec. IV para. (10), (11); T.T. p. 386-391]

During the early part of the school year in 1970, Dr. Von Schaaf managed to avert any serious racial disturbances. However, on one occasion the white students did engage in an active protest against the school symbols having been banned.[6] Also, racial tensions increased as a result of several incidents where some black students' automobiles were maliciously damaged.[7]

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[6] Dr. Von Schaaf reported the incident as follows:

Q. Has there been any demonstration by whites in favor of the Confederate flag this year, not in the school but near the school? A. Yes. Q. Tell me about that. A. Oh, back early in the fall, a group met across the street from the school in a parking lot and started a motorcade with Confederate flags. I drove back to school and they were parked on the street leading to a sewage plant on the other, I guess it would be the west end of the school, and they asked me to come out and talk to them and I said, "If you want to talk to me, come on the school grounds, I would be glad to talk to them." They asked if they could come and talk to me the next morning. I gave them permission to come in to talk to me. They came in and said they wanted to raise a protest to get the Confederate symbols back and asked what they could do, and I said, "The board has passed a ruling which the board will have to rescind. Now, if you will get your parents to accompany you, I will ask for an audience before the Board of Education for you to make your statement." [T.T. 484-485]

[7] Dr. Von Schaaf testified about the incident as follows:

A. Yes, several tires were punctured and cut during the, I believe it was in October, the latter part of October or the first of November. Q. What was the black students' reaction to this situation? A. They

The Respondents accept the Petitioners' statement of the case commencing with the last paragraph on page six of their brief and continuing through page seven thereof.

REASONS FOR DENYING THE WRIT

Certiorari should be denied because the decision of the Court of Appeals is consistent with applicable decisions of this Court, and particularly *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969). *Tinker* is grounded upon the fact that no disruption of the educational process was reflected in the record before the Court. The evidence is substantial that there were no facts upon which to base a suggestion of a *potential* for disruption.

> "There is no indication that the work of the schools or any class was disrupted." (p. 508, *supra*)
>
> "In the present case . . . our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere with the work of the school or impinge upon the rights of other students." (p. 509, *supra*)

The same factual conclusion is referred to repeatedly in the opinion. Repeated substantial disruptions occurred at

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accused Rod several times of it to me and to the assistant principal. [T.T. p. 387]

Alma Barnett testified about the incident as follows:

Q. Did the tensions rise at any time during the first of the year? A. Yes. Q. What happened? A. Well, there were several incidents on the campus where the tires on the black students' cars were cut on the parking lot and after this tension somewhat rose again and then later certain students' cars were destroyed in their own yards, you know, during the night, and then after that tensions rose greatly. [T.T. p. 105]

Brainerd High School. Potential for disruption pervaded the school environment.

The Petitioners' manner of phrasing the first issue requiring resolution by this Court admits that there are possible factual situations which would justify a school official in imposing a restriction upon the expressive activity of a student such as used by Rod Melton. Petitioners desire this Court to clarify (and specify) the factual conditions which would provide constitutional justification for suppressing speech on a school campus.

However, the *argument* of Petitioners emphasizes (1) the participation by Petitioner (Melton) as well as (2) the substantial disturbance as two absolute prerequisites to permitting a school official to limit student speech. *Tinker, supra, Healy* v. *James,* 408 U.S. 169, 92 S.Ct. 2338 (1972), and *Grayned* v. *City of Rockford,* 408 U.S. 104, 92 S.Ct. 2294 (1972), are cited in support of this interpretation.

Tinker cannot be authority for this interpretation since there was no disruption in *Tinker;* and with no disruption, there was obviously no participant in something that never occurred.

The facts in *Healy* clearly indicate the absence of material disruption, while at the same time indicating that the Court would probably have come to a contrary conclusion if the record had supported the presence of a substantial disruption. At page 2350:

> "The line between permissible speech and impermissible conduct tracks the constitutional requirement, and if there were an evidential basis to support the conclusion that CCSC-SDS posed a *substantial threat* of material disruption in violation of that command the President's decision should be affirmed." (Emphasis ours)

Then again at page 2351:

> "Dean Judd's remark reaffirms, in accord with the full record, that there was no substantial evidence that these particular individuals acting together would constitute a disruptive force on campus. Therefore, insofar as nonrecognition flowed from such fears, it constituted little more than the sort of 'undifferentiated' fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression.' Tinker v. Des Moines Independent Community School District, 393 U.S., at 508, 89 S.Ct., at 737."

Then again on the same page:

> "As we have already stated in Parts B and C, the critical line for First Amendment purposes must be drawn between advocacy, which is entitled to full protection, and action, which is not."

Thus this Court continues to disapprove of limitations upon expressive activity *unless* the facts show a substantial disturbance or a threat of such. Refusal to permit restrictions upon speech where there is no disruption, nor substantial threat of such, authorizes the restrictions where the facts are contrary. This Court's decisions do not condition a school official's right to regulate students upon both the presence of a substantial disruption and the actual participation by the student seeking First Amendment rights in the process of the disruption.

The third case relied upon by Petitioners is *Grayned* v. *City of Rockford, supra.* The Petitioners' characterization of the rule of law enunciated by this case would limit the authority of school officials to intervene "only when that expression merges with conduct by the speaker which materially disrupts classwork or involves substantial disorder or invades the rights of others. . . ." A careful read-

ing of this case does not support the Petitioners' interpretation.

This Court found the two essential ingredients present in *Grayned, supra.* There was a substantial disturbance of the classroom. And *Grayned,* the appellant, participated in the demonstration which caused the disruption. His conviction for violating the ordinance in question was upheld.

No school official was required to predict the result of the conduct under examination in *Grayned, supra.* Such prediction was a necessity in the facts now before this Court.

Petitioners, while appearing (by their statement of the issues) to acknowledge the possibility of a unique set of facts adequate to justify a prediction by school officials of disruption so as to permit a restriction of expressive activity by a student, in reality, use an argument that can only be interpreted to prohibit any school official from using common sense so as to prevent a threatened confrontation and disruption.

If there are two essential ingredients, that is, a substantial disruption coupled with participation by the student in the disruption, then school officials can never act to avoid disruption and racial confrontations because, until the disruption takes place, there can be no participants. Petitioners' reasoning and interpretation of the Constitution would stay the hand of the school official until the disruption has already commenced.

As we understand Petitioners' argument and understanding of the Constitution, (1) an actual disruption would have to take place and then (2) Petitioner (Melton) would have to participate in that disruption. If these two facts were found, then *and only then* would the school officials be justified in limiting the speech of a student. This is

a ridiculous result for under such interpretation school officials who desire to track the Constitution will be compelled to withhold action until the disruption which he is attempting to avoid has already occurred. Certainly there is nothing in *Tinker* or other applicable decisions that would justify limiting school officials to restrictive actions with reference to the freedom of speech to such a limited set of circumstances as is envisioned by Petitioners. The following cases specifically deny Petitioners' interpretation of the authority of school officials:

> *Russo* v. *Central School District Number 1 Towns of Rush,* etc., 469 F.2d 623 (1972) at page 632:
>
> "We add, however, as we did in *James,* that nothing in the First Amendment requires a school administration to wait until disruption has actually occurred before it may take protective action. Conduct which leads, or is likely to lead, to violence in the schools is not to be tolerated."
>
> *Butts* v. *Dallas Independent School District,* 436 F.2d 728 (1971) at page 731:
>
> "We assume that the School Board was not necessarily required by the First Amendment to wait until disruption actually occurred."

See also *Guzick* v. *Drebus,* 431 F.2d 594 (1970).

Inherent in the practical operation of both issues I and II as posed by Petitioners, a school official, usually the principal, is called upon to make a judgment. And that judgment must be subjective to a substantial extent. If the principal acts and restricts speech, and no disruption occurs, then his critics will say that the threat was exaggerated. Thus, if he acts and a disturbance does not take place, he exposes himself to the criticism of having acted

precipitously or upon a trivial basis. The principal is placed in the position where it can never be proven that his actions were well founded. If this theory is constitutionally sound, school officials will resolve doubts against restricting free speech on the theory that such is the only way to comply with the First Amendment. The principal ignores what his best judgment tells him should be done, and he does so because this is the only way that he can act consistently with constitutional requirements. The ability to act so as to attempt to avoid confrontations cannot be exercised. Accepted preventive techniques cannot be implemented.

On the other hand, if the disturbance does occur and if the principal has not been restrictive with reference to free speech, and if there is a connection between the speech and the disturbance, the principal will always be second guessed by those who complain that if he had taken firm action promptly, the disturbance would never have occurred. Petitioners took this position in their proof and argument (App. p. 26a).

Once Petitioners' theory is examined, and coupled with the interpretation of recent decisions of this Court, the actual application thereof produces a completely illogical and impractical result.

Respondent also relies upon *Cohen* v. *California,* 403 U.S. 15 (1971), as limiting the extent to which speech can be abridged because of the potential audience reaction to it. The conduct under question occurred in the Los Angeles Court House and not on a high school campus, a factual distinction of substance when free speech is concerned. And no disruption of any nature took place. Nothing in *Cohen* is at odds with the decision of the Sixth Circuit in this case.

Respondents agree with Petitioners that public school

students have the right of freedom of expression. But as Mr. Justice Marshall declared in *Grayned, supra*:

> "But we nowhere suggested that students, teachers, or anyone else has an absolute constitutional right to use all parts of a school building or its immediate environs for his unlimited expressive purposes. Expressive activity could certainly be restricted, but only if the forbidden conduct 'materially disrupts classwork or involves substantial disorder or invasion of the rights of others.'" (p. 2304)

Respondents also agree with Petitioners that:

> "The national imperative of providing racial equality in education should not be sought at the expense of the First Amendment."

As this Court enunciated in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1970):

> "Nothing in our national experience prior to 1955 prepared anyone for dealing with changes and adjustments of the magnitude and complexity encountered since then." (p. 13)

However, the effort must continue and with the structure, organization, personnel and supporters as are available. When a racial confrontation closes a school, there is no educational opportunity in an empty school building. Every effort must be made to avoid and prevent tension of such intensity as to force the closing of a school. This is the initial obligation and responsibility of those educators selected to discharge this responsibility.

The breadth of the authority of school officials is described in the following quotation from *Tinker, supra,* at page 507:

> "On the other hand, the Court has repeatedly emphasized the need for affirming the comprehensive

> authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools. * * * Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities."

Thus the balancing responsibility falling upon the shoulders of school officials is identified. Not only is there the right of freedom of speech but there is also the right to an equal educational opportunity. During the 1969-70 school year, there was substantial disruption of classroom activity as a result of the racial tension and with extensive use of Confederate symbols. Dr. Von Schaaf exercised some limitation on Rod Melton but did so only because his judgment and experience indicated that Rod Melton's wearing of the Confederate replica might just well be the spark that would ignite another period of substantial disruption of classroom activity.

The balancing of the constitutional rights of the students was initially a burden upon Dr. Von Schaaf and upon his shoulders alone. He could not avoid a consideration of the possible impact upon the black students at Brainerd in the light of his experience in the previous spring. To perform his legal obligation it was necessary for him to engage in the activity of predicting. Included within the act of predicting was an evaluation of the possible hostile reaction of black students to the school authority officially permitting Rod Melton to wear a replica of the Confederate flag after the same school authorities had decided to prohibit the use of the song "Dixie" and the Confederate flag on the Brainerd campus.

That school authorities are authorized to evaluate and predict possible future events is recognized by *Russo, supra, Butts, supra,* and *Guzick, supra.*

That the nature of limitations upon free speech as constitutionally permissible on a school campus differs from a public street or a public auditorium is generally approved, as is indicated by the following quotation from *Shanley* v. *North East Independent School District Bexar County, Texas,* 462 F. 2d 960 decided June 9, 1972 at page 968:

> "Because high school students and teachers cannot easily disassociate themselves from expressions directed towards them on school property and during school hours, because disciplinary problems in such a populated and concentrated setting seriously sap the educational processes, and because high school teachers and administrators have the vital responsibility of compressing a variety of subjects and activities into a relatively confined period of time and space, the exercise of rights of expression in the high schools, whether by students or by others, is subject to reasonable constraints more restrictive than those constraints that can normally limit First Amendment freedoms."

The cases relied upon by Petitioners reveal factual circumstances other than on a school campus and are not applicable to the case in question. The public streets were involved in *Gregory* v. *Chicago,* 394 U.S. 111 (1969). A public auditorium was involved in *Terminiello* v. *Chicago,* 337 U.S. 1 (1949). *Cohen* v. *California,* 403 U.S. 15 (1971) reflected speech in the halls of the Los Angeles Court House. The South Carolina State House grounds were involved in *Edwards* v. *South Carolina,* 394 U.S. 111 (1969). The holdings in the above cases and the language reflected in these opinions, cannot be divorced from the fact that the environment of the classroom was not before the Court.

Individual acquiescence and self discipline are a necessary part of the classroom atmosphere if learning is to take place.

The substantial disruption that took place in the spring of 1970 at Brainerd High is an essential part of the fact situation before the Court. The substantial disruptions that took place did close the school, and did terminate, during the period that the school was closed, any educational opportunity for the black and white students at Brainerd. Thus clearly, the substantial disruption aspect amounts to and is equated with a complete denial of an educational opportunity and reflects an actual intrusion upon the rights of the students attending Brainerd High. This is in sharp contrast with the following quote from *Tinker, supra,* at page 508:

> "Accordingly, this case does not concern speech or action that intrudes upon the work of the schools or the rights of other students."

For this reason, the following cases cited by Petitioners do not support Petitioners' interpretation because there was no evidence of a substantial disruption evident in the facts set forth in such cases, and there was no likelihood of a substantial disruption. Included within this category are *Williams* v. *Eaton,* 468 F. 2d 1079 (10-31-72); *Butts* v. *Dallas Independent School District,* 436 F. 2d 728 (1-14-71); *James* v. *Board of Education of Central District Number 1,* 461 F. 2d 566 (5-24-72); and *Russo* v. *Central School District Number 1 Towns of Rush,* etc., 469 F. 2d 623 (1972).

The particular and peculiar factual situation existent at Brainerd High School in September of 1970 is the only issue in this case.

As was said in *Shanley, supra,* page 975:

> "As we have made clear in this opinion, the balancing of expression and discipline is an exercise in judgment for school administrations and school boards, subject only to the constitutional requirement of reasonableness under the circumstances."

And where reasonable minds may differ in this balancing of constitutional rights, school authority decisions will govern. *Butts, supra,* at page 732:

> "Our difference with the trial court therefore is that we do not agree that the precedential value of the *Tinker* decision is nullified whenever a school system is confronted with disruptive activities or the possibility of them. Rather we believe that the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extingish, unless they find the circumstances *allow them no practical alternative.* As to the existence of such circumstances, they are the judges, and if within the range where reasonable minds may differ, their decisions will govern. But there must be some inquiry, and establishment of substantial fact, to buttress the determination." (Emphasis ours.)

Tinker reflected only apprehension of disturbance by the school authority and "a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." (p. 509)

The Petitioners agree with the factual conclusion of the dissenting opinion in the Court of Appeals decision to the effect that Dr. Von Schaaf over-reacted to the facts at his school as they existed on September 8, 1970.

While constitutional issues place a responsibility upon this Court to examine the facts on the record independently of the findings of the trial and appellate courts, we doubt the wisdom of a fourth official evaluation of a set of facts occurring in an environment that existed only at Brainerd High School in Chattanooga, Tennessee, on September 8, 1970. And this fourth look at the facts is the heart of petitioners' argument.

Neither Dr. Von Schaaf nor defendant Chattanooga Board of Education lays any claim to infallibility in perceiv-

ing and judging facts on a school campus as a probable prelude to a substantial disruption of the educational process. But they are not without actual experience. And there is no question but that Dr. Von Schaaf's decision was subjective. But, how else was he to make a decision? That an official decision is partially subjective does not make it automatically unconstitutional.

Dr. Von Schaaf was specially selected by the School Superintendent to take over as principal of Brainerd High School in mid-year, an unprecedented administrative reorganization, but demanded by the environment at Brainerd. He had been specially educated to perform the function of high school principal. His years of actual experience supported his qualification to make the subjective decisions normally required of all high school principals.

As was recognized by this Court in *Swann, supra,* nothing prepared high school principals for the unique circumstances incident to desegregating a formerly all-white high school under Court order and against the desires of the vast majority of taxpayers who created and supported the public school system. Dr. Von Schaaf and the entire school was walking a road it had never traveled before, nor has anyone else.

Nevertheless, the decision on September 8, 1970 was that of Dr. Von Schaaf. He made the decision. No school disruptions followed. But Rod Melton did have to forego wearing his Confederate patch.

Every aspect of Dr. Von Schaaf's judgment was questioned in depth before the Federal District Court, and he was vindicated.

The principal's judgment was reviewed by the Court of Appeals and again his judgment was found to be supported by the record.

Now the petitioners would seek a fourth governmental evaluation of the propriety of an action on September 8, 1970 and on a written record with all of its inherent defects. Such does not appear to be a proper use of the appellate procedures nor of the time of the United States Supreme Court. The factual conclusions of both the District Court and the Court of Appeals support the decision reached below.

CONCLUSION

For the reasons set forth above, certiorari should be denied.

Respectfully submitted,

RAYMOND B. WITT, JR.
JOHN W. MURREY, III

WITT, GAITHER,
ABERNATHY & WILSON

1100 American National Bank
Building

Chattanooga, Tennessee 37402
Attorneys for Respondents

March 15, 1973.